Filed 2/18/14 P. v. Barnes CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDER LUCAS BARNES II, Defendant and Appellant.	G046721 (Super. Ct. No. 10CF1076) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Michelle May Peterson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The superior court sentenced defendant Alexander Lucas Barnes II to prison for 25 years to life after a jury found him guilty of second degree murder and assault on a child resulting in death. (Pen. Code, §§ 187, 273ab, subd. (a).) Defendant claims the evidence fails to support his conviction and the trial court erred in ruling on the admissibility of certain evidence. We affirm the conviction.

FACTS

Nancy Prim was the mother of Isaiah Eric Prim-Ortiz, born December 28, 2008. Jesse Ortiz was Isaiah's father. While pregnant with Isaiah, Prim began a romantic relationship with defendant.

In October 2009, Prim lived with her grandparents. She was pregnant with defendant's child, who was born October 28. Defendant spent most of his time with Prim and the remainder at an apartment occupied by his mother, Devonna Law, her husband and children, 12-year-old T.A. and 15-month-old J.L.

On October 6, Law agreed to take care of Isaiah while Prim attended classes at a community college. Law picked up Prim, Isaiah, and defendant at the grandparent's home. She took Prim to school and returned to her apartment with defendant, Isaiah, T.A., and J.L.

Sometime thereafter, Isaiah began crying. Law picked up Isaiah to comfort him. She then handed Isaiah to defendant. He walked around the apartment with Isaiah before taking him outside. Defendant returned several minutes later and placed Isaiah, who was no longer crying, in a crib.

Later, Law took J.L. to the bedroom for a nap. She checked on Isaiah and noticed "he didn't look right." Law called for defendant, asking "what happened." Defendant picked up Isaiah and unsuccessfully tried to wake him. Law called 911 and began performing CPR on Isaiah.

A paramedic testified that when he arrived Isaiah was unconscious, not breathing, and had a bluish skin color. En route to the hospital, paramedics determined his airway was not obstructed, but he had no circulation, pulse, or neurological function, and was cool to the touch. Further efforts to revive him at the hospital were unsuccessful. Both the paramedics and an emergency room physician who attempted to resuscitate Isaiah testified they did not observe any external trauma in their cursory examinations of the child's body. But the physician noted Isaiah had "a lot of hair" that may have covered any head injury. He testified that even without external injury to the head, there could be internal trauma.

Three forensic pathologists testified at trial. All three experts agreed Isaiah died from blunt force trauma to the head caused by some sort of crushing mechanism applied to the right side of the infant's head that pressed the left side of the head against a large surface area resulting in several skull fractures and bleeding on the brain's surface. They also agreed all of the injuries were recent in nature, having been inflicted within 24 hours of Isaiah's death.

The prosecution introduced a photograph depicting the stucco wall outside the Law apartment. Over a defense foundational objection, Dr. Anthony Juguilon was allowed to testify small red pinpoint abrasions on the left side of Isaiah's scalp were "consistent with being pressed against a surface like" the apartment's exterior stucco wall. Both Drs. Duc Van Duong and Terri Haddix, who testified for the defense, agreed the abrasions were consistent with Isaiah's head being pressed against a rough or textured surface such as a stucco wall.

Dr. Juguilon stated a circular depression on the right side of Isaiah's skull could have been caused by a thumb or other semi-ovoid object, but also acknowledged it was "consistent with a hand with a crushing-type mechanism on a skull . . . ." Dr. Duong, who performed Isaiah's autopsy, opined the depression was consistent with being

caused by "a hard flat object approximately one inch in diameter." Dr. Haddix testified the force pressing on Isaiah's head was "broadly applied" and consistent with a hand.

At trial, the prosecution's theory was that defendant, frustrated with Isaiah's crying, pressed his head against the wall outside the Law's apartment thereby fracturing Isaiah's skull, and causing brain hemorrhaging.

Prim testified Isaiah was a healthy baby and she regularly saw a doctor during her pregnancy and for monthly pediatric check ups after his birth. He usually cried when he was tired or hungry. Prim's grandmother agreed Isaiah had no medical problems and appeared to be "in good health" when she saw him on the morning of October 6. Prim said defendant purchased food for Isaiah and occasionally played with him, but both she and other prosecution witnesses testified defendant would get mad when Isaiah cried. On several occasions defendant angrily told the infant to "'shut up,'" "'stop acting like a pussy,'" and "'man up.'"

After being questioned on October 7, defendant told Prim the police claimed the Law's apartment complex had security cameras and they had a recording of his actions on the day Isaiah died. He did not believe this claim, but asked Prim to check the complex for security cameras. In an interview a week later, Prim told the police about defendant's request and that he also said she should tell them Isaiah hit his head on Law's car when she was placing him in the car seat the morning of October 6. Subsequently, the police covertly recorded a telephone call between Prim and defendant.

Prim acknowledged remaining romantically involved with and standing by defendant for a year after Isaiah's death, including even after this prosecution was filed. Ultimately, she reached the conclusion he was responsible for Isaiah's death.

The defense agreed Isaiah died from blunt force trauma to the head caused by some crushing mechanism, but claimed the evidence did not support a conclusion defendant inflicted the injuries. Law testified defendant "would take care of [Isaiah] like he was his own" child, feeding, changing, and bathing the infant. T.A. said she had

observed defendant feeding Isaiah, changing his diaper, and putting him down for naps. According to Law, when Isaiah began crying at the apartment on October 6, defendant offered to hold him.

At trial, T.A. testified defendant did not get upset when Isaiah cried on that occasion, but she acknowledged he had become frustrated when it happened in the past. The prosecution rebutted her testimony, calling Detective Michael Judson who questioned T.A. after Isaiah died. According to Judson, once informed the police considered Isaiah's death a homicide, T.A. responded defendant appeared angry when Isaiah began crying and screamed "'shut up'" at him. Judson said T.A. also told the police that, after paramedics left with Isaiah, defendant's "demeanor was 'normal, . . . as if nothing had happened'" and he discussed video games with one of the responding police officers.

The defense presented evidence Isaiah may have suffered the fatal injuries earlier in the day. Prim testified her grandparents usually cared for Isaiah when she went to school. Since she used public transportation, Prim said she had to leave home by 8:00 a.m. to reach the campus in time for classes. On direct examination, she claimed she decided not to attend class on October 6 after hearing her grandmother complain about defendant. But the grandmother later testified she did not take care of Isaiah that day because she was ill.

During cross-examination Prim acknowledged her grandmother did not start complaining about defendant until after 9:00 a.m. Asked why she waited until that time to decide to stay home from school, Prim then claimed she woke up late.

Prim also admitted holding Isaiah while taking a shower that morning, but denied dropping him or pinning him against the wall to prevent a fall. Law testified that when speaking with Prim on the phone to arrange taking care of Isaiah, both Prim and the infant were crying. According to Law, Isaiah's crying sounded alarming. Prim denied she did not want her grandparents to care for Isaiah on October 6 because she knew

something was wrong with him. She further acknowledged Isaiah had a medical appointment on October 6 that she missed, claiming "I guess I forgot . . . ."

Defense counsel asked Prim whether Isaiah struck his head on Law's car when she was placing him in the car seat. She denied that occurred. Law contradicted this claim, testifying that "when [Prim] went to put [Isaiah] in the car, she hit his head on the car door frame." The prosecution rebutted Law's testimony by calling two police officers who questioned Law on separate occasions after Isaiah died. Each officer testified Law did not mention the infant striking his head on her car, even after the second officer informed her of the nature of Isaiah's injuries. Law claimed she informed the police of this incident when questioned, but acknowledged there was no mention of it in the transcript of her second interview. Drs. Juguilon and Haddix agreed the injuries Isaiah suffered could not have resulted from striking his head on a car.

Law described Isaiah as "[k]ind of lethargic" and "not himself" the morning of October 6. She noticed he "had a blotch on his face and a welt under his eye," and asked Prim "what was wrong with [Isaiah's] face." According to Law Prim said "he was maybe allergic to the carpet."

DISCUSSION

1. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence to support his conviction on two grounds. First, as to both counts, he argues the evidence fails to support the prosecution's theory he committed the act resulting in Isaiah's death. Second, on the murder charge, he claims there is insufficient evidence he "knew the force applied [to Isaiah] was dangerous to human life, rather than merely assaultive." Both contentions lack merit.

The principles governing sufficiency of the evidence claims are "clear and well settled." (*People v. Abilez* (2007) 41 Cal.4th 472, 504.) "'The proper test . . . is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]' [Citation.]" (*People v. Perez* (2010) 50 Cal.4th 222, 229.)

The same standard applies under federal law. "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560].)

Defendant was charged with two crimes, second degree murder and assault on a child resulting in death. "[S]econd degree murder, . . . is 'the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.'" (*People v. Cravens* (2012) 53 Cal.4th 500, 507.) Penal Code section 273ab, subdivision (a) imposes a 25 years to life prison sentence on "[a]ny person, having the care or custody of a child who is under eight years of age, who

assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death . . . ."

There was conflicting evidence about Isaiah's health when Law picked up both he and Prim the morning of October 6. The prosecution's evidence indicated Isaiah was a healthy child until shortly before his death. The jury was free to accept this testimony. Not only did Prim testify to this fact, T.A. said Isaiah looked "fine" when she first saw him that morning. At the Law's apartment, Isaiah played with J.L. Law said defendant fed Isaiah during this time and she did not notice anything was wrong with Isaiah until shortly after defendant returned to the apartment with him. Dr. Juguilon claimed these activities "would be unlikely" had Isaiah suffered the fatal injuries earlier that morning. Dr. Duong agreed that while the fatal injuries were sustained within 24 hours before Isaiah died, the infant would have begun experiencing neurological trauma within only 10 to 20 minutes. Even Dr. Haddix acknowledged a child would immediately experience some functionality problems after suffering subarachnoid bleeding.

Further, the prosecution's evidence supported a finding defendant easily became upset with Isaiah when he cried and engaged in the absurd behavior of telling the nine-month old infant to "shut up," not act "'like a pussy,'" and "'man up.'" Although T.A. denied it on the stand, a police officer testified she said that when Isaiah began to cry at the Law apartment on October 6, defendant screamed "shut up" before picking him up and going outside.

All three pathologists agreed as to the cause of death. As Dr. Haddix explained, "the type of mechanism . . . would be a type of compressive force . . . applied to the right-hand side of the head . . . broad enough such that we don't have an injury located [o]n the skin itself . . . with the left side of the head coming up against something that's relatively immovable such that it's going to cause the fracture on the left [side of the skull] and impact . . . the skin . . . ."

Defendant takes pains to criticize Dr. Juguilon's testimony on the cause of the abrasions found on the left side of Isaiah's scalp. He argues Dr. Juguilon was allowed to testify the abrasions "were consistent with the stucco outside . . . Law's apartment." This argument misconstrues Dr. Juguilon's testimony. After showing him a photograph of the doorway and adjoining wall of the Law's apartment, the prosecutor asked whether "the injuries that you saw on this . . . child's head . . . are consistent with being pressed against a surface like this." Dr. Juguilon responded, "those injuries would be consistent with that scenario." He never claimed his opinion was limited to the particular stucco outside the Law's apartment. Furthermore, Drs. Duong and Haddix agreed these abrasions were consistent with Isaiah's head being pressed against a rough or textured surface such as a stucco wall.

Further, there was no evidence the other possible explanations for Isaiah's injuries, being dropped in the shower stall, pinned up against the wall of the shower stall, or striking his head on Law's car, presented physical characteristics that could have caused the abrasions found on Isaiah's scalp. The jury could reasonably infer from the pathologist's testimony that the cause of the abrasions found on Isaiah's scalp came from being pressed up against the stucco wall outside the Law's apartment.

Defendant's statements after Isaiah died, asking Prim to check for video surveillance cameras at the Law's apartment complex and urging her to tell the police Isaiah struck his head on Law's car, sufficed to support an inference of consciousness of guilt on his part. "[T]here need only be some evidence in the record that, if believed by the jury, would sufficiently support the suggested inference." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102.)

His attack on the sufficiency of evidence that he acted with malice is also without merit. Initially, we note his trial attorney acknowledged the defense was identity, stating "intent, although it's an element of the crime," was "not an issue in this case." Further, the evidence supports a finding defendant acted with the requisite mental state

necessary to support a conviction for second degree murder. "'Malice is implied when the killing is proximately caused by "'an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.'" [Citation.] In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another . . . .'" (*People v. Cravens*, *supra*, 53 Cal.4th at p. 507.)

The evidence showed Isaiah's head was pressed against a broad textured surface with enough force to simultaneously cause at least five skull fractures, one of which passed entirely through the thickness of the skull. Dr. Juguilon testified the "type of force to create . . . these types of fractures" is usually seen "high-speed motor vehicle collision[s], a fall from a significant height [i.e., six feet or more], or abusive [i.e., intentional] head trauma." Dr. Haddix agreed "given th[e] pliable nature of a child's skull," "significant force" was required "to create fracture[s]" found on Isaiah's head. The subjective component of implied malice "requires only that a defendant act[] with a "'conscious disregard for human life.'"" (*People v. Knoller* (2007) 41 Cal.4th 139, 157.) We conclude a jury could find that an adult male pressing the head of a nine-month-old infant against a wall with sufficient force to fracture the skull acted with the requisite mental state needed to support a conviction for second degree murder.

Defendant appears to argue that since the evidence supported conflicting scenarios on how Isaiah died, we cannot uphold his conviction. That is not the law. """'Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt.'"'' [Citation.]" (*People v. Abilez*, *supra*, 41 Cal.4th at p. 504.) Thus, "[i]f the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) The same principle applies under federal law. "Only under a theory

that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could [a petitioner's insufficiency of evidence] challenge be sustained. That theory the Court has rejected . . . . Under the standard established . . . to preserve . . . due process . . ., a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 326; see also *Cavazos v. Smith* (2011) ___ U.S. ___, ___ [132 S.Ct. 2, 6, 181 L.Ed.2d 311, 316] [following *Jackson* in finding sufficient evidence to support grandmother's conviction under Penal Code section 273ab for the death of her seven-week-old grandchild].)

We conclude the evidence is sufficient to support defendant's conviction on both charges in this case.

2. Exclusion of Evidence Rebutting the Fabrication of False Evidence Claim

a. Background

The trial court conducted a pretrial hearing concerning the admissibility of several items of evidence, including Prim's claims defendant purportedly asked her to check the apartment complex for security cameras and urged her to tell the police Isaiah hit his head on the door of Law's car. During the hearing, defense counsel acknowledged Prim reported defendant made these statements to the police before the police covertly recorded phone call between her and defendant.

Nonetheless, defense counsel urged the transcript of the recorded covert phone call would rebut the probative value of Prim's proposed testimony that defendant asked her to say Isaiah struck his head on the car: "I don't believe the statement . . . was, [you] should lie to the police. The statement was, did you tell the police that Isaiah hit his head on the car when he was being loaded into the car? And there's a question during

the actual covert call, why did you tell me to tell the police that . . . Isaiah hit his head? You know he didn't hit his head. [¶] And this then introduces Ms. Law, my client's mother, who is on the other end of the line, [defendant] asking his mother, no, I didn't say that. My mom said that happened. Mom, isn't that what happened? Mom gets on the phone and says, yes, she thought Isaiah had hit his head upon being loaded into the car. But it's nothing attributable to [defendant] telling [Prim] to say that. He's asking her if she said that in relation to the information coming from his mother."

At trial, Prim testified the police questioned her several times after Isaiah's death. During an October 12 interview she said that in a conversation with defendant "at his house" after the police questioned him on October 7, defendant "said he didn't know what could cause" Isaiah's death, but the infant "probably hit his head on the car, [and] to tell th[e police] that or something if he had fractures in his head."

While cross-examining Prim on this testimony, the following occurred: "Q. Isn't it actually what [defendant] . . . did was ask you if you told the police that the baby hit his head on the car door in the context of, Oh, we're talking about the case, did you tell the police Isaiah hit his head on the car door? [¶] A. No. He wanted me to tell them that and it's not true. [¶] Q. Well, you questioned him regarding that, right? [¶] A. Yes. Why did he tell – want me to tell the police that. [¶] Q. Okay. And he informed you that his mother said she heard . . . [¶] [Prosecutor]: Objection. Multiple layers of hearsay. [¶] [The Court]: Sustained." Defense counsel proceeded to question Prim on another subject.

b. Analysis

Defendant argues the trial court erred in sustaining the prosecution's hearsay objection because the evidence the defense sought to elicit was admissible for relevant nonhearsay purposes: (1) as circumstantial evidence of his state of mind, i.e.,

that his mother told him Isaiah hit his head; (2) to impeach Prim; and (3) to place her testimony in context.

The Attorney General asserts the issue was forfeited by noncompliance with Evidence Code section 354, subdivision (a). Evidence Code section 354, subdivision (c) generally preserves for appeal an issue of whether the trial court erred in excluding evidence where it "was sought by questions asked on cross-examination." Nonetheless, while "counsel ordinarily need not make an offer of proof in order to challenge on appeal the trial court's ruling sustaining an objection to a question asked on cross-examination[,] . . . [t]his rule . . . does not apply . . . when it is clear the trial court has overlooked the question's probable relevance . . . ." (*People v. Allen* (1986) 42 Cal.3d 1222, 1270, fn. 31; see also *People v. Fauber* (1992) 2 Cal.4th 792, 854.) That is the situation here and defense counsel failed to explain the relevance of this line of questioning.

Even on the merits, defendant's arguments fail. He claims what Law purportedly told him about Isaiah striking his head was admissible to show his state of mind and rebut the claim he fabricated a false explanation for the infant's injuries. (*People v. Riccardi* (2012) 54 Cal.4th 758, 823 ["statements . . . not hearsay to the extent they were admitted to prove circumstantially . . . state of mind or conduct, and not to prove the truth of matters asserted"].)

"Evidence of a declarant's statement is not hearsay if it relates facts other than declarant's state of mind and is offered to circumstantially prove the declarant's state of mind. [Citation.] However, a statement is hearsay if it directly asserts the declarant's state of mind and is offered to prove the declarant's state of mind." (*People v. Frye* (1985) 166 Cal.App.3d 941, 950.) In *Frye*, a burglary suspect, Leffingwell, told a police officer he entered the victim's residence "'looking around.'" (*Id.* at p. 949.) The trial court barred the defense from cross-examining the officer on what Leffingwell told him about his reason for being inside the house. Affirming, the appellate court declared,

"Leffingwell's statement he entered to 'look around' is a direct statement of his intent. Paraphrasing, Leffingwell told police he entered 'to look,' not to steal. Because offered for the truth of the matter stated, it is hearsay." (*Id.* at p. 950.)

As summarized by defense counsel during the pretrial hearing, defendant's purported response to Prim's accusation that he asked her to tell the police Isaiah struck his head on the car door was "No, I didn't say that. My mom said that happened." This response is a direct statement of his state of mind and thus hearsay.

Nor do the alternative grounds for admitting this evidence, to impeach Prim and place her statement in context, support a conclusion the trial court erred by sustaining the prosecution's objection. Defendant's argument as to the admissibility of the contents of the covert phone call is premised on the theory his only statement about Isaiah hitting his head occurred during that call. But it is apparent from the record defendant asked Prim to tell the police Isaiah hit his head in a face-to-face conversation between the two of them shortly after Isaiah's death.

On direct examination, Prim testified defendant urged her to make this claim "at his house" sometime after October 7. She reported to the police what he urged her to do during an October 12 interview. Defense counsel also acknowledged the existence of two separate conversations during the pretrial hearing. In discussing defendant's purported request that Prim check for security cameras at the apartment complex, defense counsel asserted "Ms. Prim's testimony . . ., I believe, is from a statement she made to the police right before the covert phone call which was made days later . . . ." When the prosecutor argued defendant's statement about telling the police Isaiah struck his head also reflected "a consciousness of guilt," the following colloquy occurred: "[The Court]: And I don't know, this isn't part of the covert call. [¶] [The prosecutor]: No. [¶] [Defense Counsel]: It's a statement she makes prior to the covert call." The two-conversation scenario is also consistent with defense counsel's summary of the discussion during the recorded covert phone call. He acknowledged defendant

asked Prim "*did* you tell the police that Isaiah hit his head," to which Prim responded "[w]hy *did* you tell me to tell the police that[?]" (Italics added.)

Since the subject of Isaiah striking his head on Law's car was the subject of two separate conversations between defendant and Prim, the statements in the recorded phone call lose their relevance as a basis to further impeach Prim's credibility. There is no evidence that during the face-to-face conversation, defendant told to Prim his mother said Isaiah struck his head. Also, since Prim claimed defendant asked her to say Isaiah hit his head in a conversation separate from the covertly recorded phone call, Evidence Code section 356 is inapplicable. "The purpose of Evidence Code section 356 is to avoid creating a misleading impression. [Citation.] It applies only to statements that have some bearing upon, or connection with, the portion of the conversation originally introduced. [Citation.] Statements pertaining to other matters may be excluded." (*People v. Samuels* (2005) 36 Cal.4th 96, 130.)

Even assuming the trial court erred in sustaining the prosecution's objection, the error was harmless. We review erroneous evidentiary rulings for whether a reasonable probability exists that a result more favorable to the defendant would have been reached in the absence of the error. (*People v. Page* (2008) 44 Cal.4th 1, 42.)

Contrary to defendant's assertion, his request that Prim tell the police Isaiah struck his head on Law's car was not the sole evidentiary basis for finding a consciousness of guilt on his part. As noted, after the police told him the Law family's apartment complex had security cameras that recorded what he had done with Isaiah, defendant asked Prim to check for cameras. This request suggests he was concerned independent evidence existed of what occurred. If defendant had done nothing wrong he should have been relieved his actions were recorded, not seeking reassurance of his belief there were no cameras.

Further, the defense was allowed to rebut Prim's claim defendant asked her to lie about Isaiah hitting his head through the testimony of Law. At trial, she stated

"when [Prim] went to put him in the car, she hit his head on the car door frame." During closing argument defense counsel argued, without objection, that this state of the evidence supported a conclusion defendant relied on what his mother told him when he asked Prim to tell the police Isaiah hit his head on the car. "Now, Isaiah hitting his head. We heard about that from [Prim]. She said, . . . he told me to lie to the police about Isaiah hitting his head on the car door. No. No. No. I questioned [Prim] about that. Isn't it true that he asked you if you told the police that the baby hit his head on the car? She said, no. Why would you say that? That never happened. [Defendant] said, well, my mom told me that. Is that likely? Yes, [Law] got on the stand and said she saw it. She told [defendant] the baby hit his head on the car."

Defendant argues the trial court's ruling violated his Sixth Amendment right to confrontation. But "'not every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination . . . . Thus, unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment. [Citation.]'" (*People v. Linton* (2013) 56 Cal.4th 1146, 1188.) Defense counsel was given wide latitude to bring out discrepancies in Prim's version of the events on October 6. Impeachment on the contents of the covert phone call would only have been cumulative in this case.

His alternative ineffective assistance of counsel claim also lacks merit. "To establish ineffective assistance, [a] defendant must show both that his counsel's performance was deficient and that he suffered prejudice." (*People v. Linton, supra,* 56 Cal.4th at p. 1166.) Defense counsel's decision to forego further questioning of Prim on what was said during the covert phone call constituted a tactical decision to which we accord substantial deference. (*People v. Williams* (1997) 16 Cal.4th 153, 215.) Here,

rather than continue with this line of questioning and possibly emphasize the fact Prim's fabrication claim was based on her earlier in-person conversation with defendant, counsel may have concluded he could effectively rebut her testimony by eliciting from Law that Isaiah struck his head on the car door when Prim placed the infant in his car seat. Simply because this tactic was fraught with the potential the prosecution would impeach Law with her failure to mention Isaiah striking his head when the police questioned her did not render his choice of this approach deficient.

Even assuming deficient performance by trial counsel, to show prejudice "the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) Given the pathologists' testimony about the cause of Isaiah's death, the other evidence showing a consciousness of guilt on his part, plus the fact he had an alternative means of rebutting Prim's fabrication claim, defendant fails to show counsel's tactical decision caused him prejudice.

In light of the entire record, we conclude the trial court's limitation on cross-examining Prim on whether defendant told her to lie about Isaiah striking his head did not constitute error much less prejudicial error.

3. Dr. Juguilon's Testimony

Defendant's next evidentiary error claim is that Dr. Juguilon was allowed to testify, over a lack of foundation objection, "Isaiah's injuries were consistent with being pressed against the particular stucco outside of [the] Law's apartment." He argues this was error because neither Dr. Juguilon nor anyone else "examined [that] . . . stucco wall," "tried to compare Isaiah's scalp injury . . . with the particular stucco outside of [the] Law's apartment," or that such a comparison "could be reliably done with only a

photograph of the injury or the stucco." Defendant further asserts Dr. Juguilon's opinion "was the only causal evidence the prosecution had to bolster any theory [that defendant] kill[ed] Isaiah."

This contention lacks merit primarily because, as noted above, it misconstrues Dr. Juguilon's testimony. The prosecutor showed Dr. Juguilon a photograph depicting the door of the Law's apartment and its exterior wall and asked, "Do you see the *texture* of this stucco[?]" (Italics added.) Dr. Juguilon said "[y]es," and the prosecutor asked, "Do you have an opinion as to the texture of this stucco and the injuries that you saw on the young child's head as to whether or not those injures are consistent with being pressed against *a surface like this*[?]" (Italics added.) Dr. Juguilon answered, "[y]es, those injuries would be consistent with that scenario."

Contrary to defendant's claim, Dr. Juguilon opined the abrasions on the left side of Isaiah's skull were "consistent with th[e] scenario" of "being pressed against *a surface like*" "*the texture of* th[e] stucco" depicted in a photograph of the exterior wall of the Law's apartment. (Italics added.) He did not testify or suggest there was anything unique about the characteristics of that exterior stucco wall. Nor did he claim or suggest the abrasions on the left side of Isaiah's skull could be matched to its surface. Rather, he testified the abrasions were "consistent with being pressed against a *surface* like" that appearing on the photograph of the apartment's exterior wall. (Italics added.)

Evidence Code section 801 allows an expert witness to express an opinion "[r]elated to a subject . . . sufficiently beyond common experience" that it "would assist the trier of fact" if it is "[b]ased on matter . . . perceived by or personally known to the witness or made known to him at or before the hearing, . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." The trial court has wide discretion in determining the admissibility of an expert opinion. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1172.)

"[Q]ualified medical experts may, with a proper foundation, testify on matters involving causation when the causal issue is sufficiently beyond the realm of common experience that the expert's opinion will assist the trier of fact to assess the issue of causation. [¶] However, even when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. [Citation.] For example, an expert's opinion based on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from evidence. [Citations.]" (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.)

The requirements for admitting expert opinion testimony were satisfied in this case. The evidence established the Law's apartment had an exterior stucco wall. All experts agreed, including Dr. Duong who performed Isaiah's autopsy, that the left side of Isaiah's head had been pressed against a surface with rough or textured physical characteristics such as stucco. Dr. Juguilon testified the abrasions on Isaiah's left scalp "occur[red] by some sort of either impact" with "a surface" "with small little surface areas." Dr. Duong agreed the abrasions required contact with "a rough type surface," that he was familiar with stucco, and "the abrasions . . . would . . . be consistent with a child's [head] pressing up against stucco." Asked if the "abrasion[s] w[ere] consistent with being pushed up against a rough surface such as stucco," Dr. Haddix responded, "[y]eah, I think that's a mechanism to produce this."

The trial court did not abuse its discretion in allowing Dr. Juguilon to testify the abrasions found on the left side of Isaiah's scalp were consistent with the scenario of being pressed against surface with a texture like that seen on the exterior wall of the Law's apartment.

4. Exclusion of Law's Statement to the Police

a. Background

As mentioned, Law testified Isaiah's head struck the car door frame when Prim was putting him in his car seat the morning of October 6. The prosecution impeached her testimony, calling two police officers who questioned Law after Isaiah died. Both officers denied Law mentioned Isaiah striking his head on her car. The second officer, Investigator Tom Kirchmeyer, testified his interview with Law was recorded.

Law also testified she noticed Isaiah "had a blotch on his face and a welt under his eye." She claimed she asked "what was wrong with [Isaiah's] face," and Prim purportedly told her "he was maybe allergic to the carpet." When Kirchmeyer was on the stand, defense counsel cross-examined on this issue as follows: "Q. Now, you did ask [Ms.] Law about Isaiah's physical condition at the time she picked Isaiah up, is that right? [¶] A. I believe [my partner] did. [¶] Q. And Ms. Law, did say she was concerned about the color of Isaiah's face that it was red, right? [¶] A. That is correct. [¶] Q. In fact, she was concerned enough about it to ask Ms. Prim about, is that right? [¶] A. I believe she did. [¶] Q. And Ms. Prim responded she did didn't know maybe it's a rash from the carpet? [¶] [Prosecutor]: Objection. Hearsay. [¶] [The Court]: Sustained. [¶] [Defense Counsel]: Nothing further."

b. Analysis

Defendant claims the trial court erred in sustaining the prosecution's objection to the question seeking Prim's response to Law's inquiry, claiming "the evidence wasn't hearsay[] because it wasn't offered for its truth – indeed, the defense clearly believed it *wasn't* true." He asserts the defense wanted to admit Prim's response to bolster Law's credibility. "Evidence that Ms. Law's trial testimony was consistent

with her police interview in other significant ways would have been important in maintaining or rehabilitating her credibility . . . ."

Initially, we note the defense failed to inform the trial court it sought to introduce what Prim said to Law for this purpose. As noted above, the rule that "counsel ordinarily need not make an offer of proof in order to challenge on appeal the trial court's ruling sustaining an objection to a question asked on cross-examination[,] . . . does not apply . . . when it is clear the trial court has overlooked the question's probable relevance . . . ." (*People v. Allen, supra,* 42 Cal.3d at p. 1270, fn. 31.) The question asked Kirchmeyer to attest to what Prim said in response to Law's question about Isaiah's health, not what Law claimed Prim told her. Thus, we agree with the Attorney General that defendant failed to preserve the issue for appellate review.

Nonetheless, on the merits, we conclude that even had defense counsel phrased the question differently the trial court properly excluded the testimony. Defendant argues the relevance of this question was to rehabilitate Law. He claims, "[t]he excluded evidence would have cast a much different light on . . . Law's police interview and testimony about what she saw that morning, particularly since the prosecution had adduced impeachment evidence just minutes earlier through the same police witness," and "[t]he more Ms. Law's trial testimony could be perceived as reasonably consistent with what she told police, the less likely . . . Kirchmeyer's testimony about Ms. Law not saying Isaiah hit his head would have been substantial impeachment."

But the prosecution never sought to impeach Law on her observations of Isaiah and Prim's claim he had a rash. Thus, the defense was not entitled to introduce her prior statements consistent with her trial testimony. (Evid. Code, § 791, subd. (b) [absent prior charge of recent fabrication, bias, or improper motive, "statement previously made by a witness that is consistent with his [or her] testimony at the hearing is inadmissible"]; see *People v. Ervine* (2009) 47 Cal.4th 745, 780 [exclusion of defendant's prior

consistent statements upheld because "earlier written statements . . . nowhere deny the reason for the barricade or defendant's awareness of who was outside," and "we emphatically reject defendant's argument that any prior written statements automatically became admissible merely because his '"credibility in general"' was attacked during cross-examination"].) Kirchmeyer's testimony did not impeach Law on what she claimed Prim said concerning Isaiah's facial marks and defendant could not introduce Law's prior consistent statements merely to bolster her overall credibility.

The trial court properly sustained the objection to defense counsel's question asking Kirchmeyer what Prim said in response to Law's inquiry about Isaiah's facial marks.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.